United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

4/23

75-7600

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COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Defendants-Appellees.

Petition for Rehearing and Suggestion for Rehearing *En Banc*

BRIEF FOR THE ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

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PRELIMINARY STATEMENT

The All-Industry Television Station Music License Committee (the "All-Industry Committee") submits this brief

as amicus curiae, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, in support of the petition by plaintiff Columbia Broadcasting System, Inc. ("CBS") for a rehearing, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, of the decision rendered by this Court in this action on April 3, 1980.

The Court's decision in this matter raises important questions regarding the inquiry required in an antitrust action under the "rule of reason" standard of Section 1 of the Sherman Act, 15 U.S.C. § 1. The decision is contrary to settled law on the nature of the rule of reason inquiry,* as well as prior decisions of this Court** and the Supreme Court in this matter*** regarding the television network blanket license here at issue. These inconsistencies, and the importance of the Court's decision to the private enforcement of the antitrust laws, fully warrant a rehearing by the Court. Rules 35, 40, Fed. R. App. P.

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*National Society of Professional Engineers v. United States, 435 U.S. 679 (1978); Chicago Board of Trade v. United States, 261 U.S. 231 (1918).

**Columbia Broadcasting System, Inc. v. ASCAP, et al., 562 F.2d 130 (2d. Cir. 1977).

***Broadcast Music Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

THE INTEREST OF THE AMICUS CURIAE

The All-Industry Committee has for many years represented the interests of the vast majority of the more than 700 local television stations nationwide in connection with music licensing and particularly the procurement of music performance licenses from ASCAP and BMI. The All-Industry Committee filed a brief as amicus curiae with the United States Supreme Court in connection with that Court's consideration of this case, filed an amicus brief with this Court to assist its consideration of the case this term, and also participated as amicus in the oral argument before this Court held on November 20, 1979.

The All-Industry Committee is currently supporting and financing (through contributions from local television stations) a class action lawsuit on behalf of all local television stations in the United States District Court for the Southern District of New York which directly challenges the legality of the ASCAP and BMI local television station blanket licenses. Buffalo Broadcasting Company, Inc., et al. v. American Society of Composers, Authors and Publishers, et al., 78 Civ. 5670 (filed November 27, 1978 (LPG)). While this Court's decision of April 3, 1980 was explicitly limited to a determination of the legality of ASCAP's and BMI's television network blanket licenses -- the Court

specifically noting that "the distinction may have significance, since the lawfulness of the blanket license has also been challenged by non-network broadcasters" (Slip Op. at 2215, n.6) -- the mode of legal analysis adopted by the Court nevertheless may have an impact on the nature of the case to be tried in the District Court relating to the local television station blanket licenses. Accordingly, the Committee has a demonstrable interest in the legal standard to be adopted by this Court to test the legality of ASCAP's and BMI's network blanket licenses.

These concerns prompt the Committee to set forth its views as to why the Court should reconsider its April 3, 1980 decision and grant CBS' petition for a rehearing.

ARGUMENT

The Supreme Court noted that this Court's prior decision in this case -- holding the network blanket license per se illegal, but remanding for a remedy which might accommodate the blanket license in circumstances in which it could "serve a market need" -- constituted a "rather bobtailed application of the rule of reason," 441 U.S. 1, 17, n.27. So too here has this Court's latest analysis -- holding that the very same network blanket license does not even rise to the level of a "restraint" under the antitrust laws -- been "bobtailed," but in the other direction. By

regarding the answer to the issue of whether "realistically available marketing alternatives" could be taken advantage of by CBS as conclusive of whether the network blanket license is a restraint of trade, the Court disregarded both well-settled antitrust principles pertaining to a rule of reason analysis and the import of the prior decisions in this case. Both the authorities and the prior proceedings herein establish that the "availability" issue is not relevant to, let alone dispositive of, the issue of whether the blanket license is a restraint of trade. Such issue, if relevant at all, is merely one of the factors to be addressed in the assessment of the anticompetitive effects of the network blanket license under the rule of reason.

The starting point for any analysis under the Sherman Act is Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), wherein the Supreme Court noted that "[e]very agreement concerning trade, every regulation of trade restrains. To bind, to restrain is of their very essence." The test of legality under the Sherman Act, the Court concluded, involves a determination of the reasonableness of the restraint, id., an analysis which, it has been held, requires a balancing of the anticompetitive effects of the challenged arrangement against any offsetting procompetitive justifications. National Society of Professional

Engineers v. United States, 435 U.S. 679, 692 (1978).

The prior proceedings in this case leave no doubt that the blanket license "restrains" trade and, accordingly, must have its legality tested by the balancing of pro- and anticompetitive effects prescribed by Professional Engineers. In particular, the manner in which this case reached this court for the second time is important in understanding the need for a rehearing here.

When this Court, in 1977 reversed the District Court's dismissal of CBS' claims, it held the ASCAP and BMI network blanket licenses to be per se illegal price fixing arrangements, Columbia Broadcasting System, Inc. v. ASCAP et al., 562 F.2d 130 (2d Cir. 1977). By so doing, the Court necessarily concluded that a restraint of trade inhered in those licenses. With respect to the "availability" of "direct" licensing (the issue on which the presence of a "restraint" is now said to hinge), the Court found:

> "[E]ven if the members of the combination are willing not only to join in the blanket license, but also to sell their individual rights separately, the combination is nevertheless a combination which tampers with price structures...."
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> * * *
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> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to complete." (562 F.2d at 136, 140.)

The Supreme Court's reversal of this Court's prior decision was not predicated on the absence of a restraint -- which would have ended the inquiry and avoided the necessity of a remand -- but on the finding that although there was a restraint, i.e., "'price fixing' in the literal sense" (441 U.S. at 8), it should not be regarded as per se unlawful, given the unique circumstances of the industry and the "milieu" in which the blanket license was adopted. Recognizing that music license fees "are not set by competition among individual copyright owners," (Id. at 23) the Court nevertheless held that the "sui generis" nature of the industry prevented the blanket license from being considered unlawful "on its face" in all circumstances (Id. at 13).* This Court's "literal approach" to illegality was said by

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*The Court found that since the blanket license "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations," there were some circumstances where, absent the blanket license, "the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all." 441 U.S. at 19. The Court was clearly referring here to the "milieu" of "individual radio stations, nightclubs and restaurants," Id. at 20, where the blanket license originated, and where "the disk jockey's itchy fingers [or] the bandleader's restive baton" precluded as a practical matter the negotiation of music rights "well in advance of the time of performance." Id. at 22, n.37.

(footnote continued)

the Supreme Court to have been not enough to "establish that this particular practice is ... plainly 'anti-competitive' and very likely without 'redeeming virtue'" Id. at 9. The per se rule adopted by this Court was seen as "difficult to contain," for under such a rule, all possible applications of the blanket license would be automatically illegal. Id. at 16.

> "[W]e cannot agree that [the blanket license] should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today." Id. at 24.

Clearly, the Supreme Court's entire approach to the blanket license, as well as its mandate that the license be subjected to "a more discriminating examination under the rule of reason," acknowledged that the license does in fact constitute a restraint of trade. The sole inquiry left for this Court was to determine whether the anticompetitive

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(footnoted continued)

The Supreme Court contrasted the possible need for the blanket license in such situations with music rights that could be individually and directly negotiated -- "nondramatic rights [and] other rights, such as sheet music, recording, and synchronization" (441 U.S. at 22 n.37) -- for which there would be little, if any, justification for blanket licensing.

effects of the network blanket licenses were outweighed by any procompetitive virtues.

In this regard, the Department of Justice's analysis is apposite:

> "We submit the most accurate manner in which to assess legality of ASCAP and BMI's blanket licensing practices relating to the television networks is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm. The thousands of music composers and publishers do not offer network users their works at prices subject to individual negotiation. They may compete by other means to obtain network exposure for their individual works but, unlike sellers in a fully competitive industry, they do not seek to obtain exposure by lowering their prices. This deviation from the competitive norm is particularly significant in view of the district court's findings that for many purposes numerous musical compositions are relatively fungible for network use. 400 F. Supp. at 783, also 779. In such circumstances, it would be expected that composers of lesser reputation, or greater financial need at any given moment, would attempt to obtain network plays by engaging in price competition.
>
> * * *
>
> "[T]he undisputed evidence of certain non-competitive market characteristics which have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anti-competitive

> effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the counter-vailing benefits." (Department of Justice Brief as Amicus Curiae, November 5, 1979 at 16-17, 20). (emphasis added)

Finally, this Court's April 3rd decision itself recognized the restraints on competition which inhere in the blanket license. Although finding that "CBS can feasibly obtain individual licenses from competing copyright owners" (slip op. at 2225), the Court at the same time acknowledged that "there is no price competition between separate musical compositions" (the blanket license being "the only device by which performing rights are licensed to the networks"), (slip. op. at 2217). The Court also recognized that since "approximately 90% of [CBS'] music is selected by program packagers," CBS, "if it wanted a program for which performance rights had not been purchased, would have to purchase rights for music already selected and recorded, in which event no meaningful price competition among copyright owners would occur." (Slip Op. at 2225-2226) (emphasis added). Thus, even were such a licensing alternative indeed "freely available" to CBS, the alternative would not result in price

competition with respect to 90 percent of the music for which CBS requires performance rights.

The undeniable operation of the blanket license as a restraint of trade thus requires a "focus ... directly on the ... restraint's impact on competitive conditions." National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1977). That inquiry clearly is not satisfied by an analysis confined solely to a determination of whether persons impacted by the restraint have the ability to avoid its impact.* The elimination of competition among those who would otherwise compete but do not --

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*Analytically, this issue may have some bearing on whether the plaintiff has been injured, or is threatened with injury by the antitrust violation. However, if relevant at all on the merits, it is simply as one of the factors to weigh in the rule of reason analysis. The Government recognized this to be the case, in stating:

> "In addition to the factually undisputed anti-competitive characteristics of the market which have developed while blanket licensing of the networks has taken place, there is the question whether the effect of the blanket license would make CBS' task of engaging in direct licensing more difficult or more costly." (Department of Justice Brief, supra at 16).

See also Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (examining plaintiff's alternatives to pro-football's player draft as but one element in the rule of reason determination).

the composers and publishers of music* -- must be subjected to a full inquiry under the rule of reason. If the blanket license is to be held legal, its "undisputed" anticompetitive effects must be outweighed by demonstrable procompetitive effects.** The Court's failure to consider this balance warrants a rehearing so that the proper legal standard may be applied.

CONCLUSION

This Court's 1977 decision, holding the television network blanket license per se illegal, was characterized by the Supreme Court as applying "a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint." 441 U.S. at 17, n.27. By failing even to reach the issue of the weighing of anticompetitive effects against any procompetitive effects, this Court's April 3, 1980 decision repeats the error. Simply put, the pendulum has

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*As Justice Stevens noted in dissent, "[T]he record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all." 441 U.S. at 33.

**To date in these proceedings, ASCAP and BMI have failed to advance any procompetitive justifications for the network blanket license. See transcript of November 20, 1979 oral argument at 213 (remarks of Department of Justice).

swung back too far, and the result is that the television network blanket license has yet to have been tested under the rule of reason standard enunciated by the Supreme Court.

For these reasons, a rehearing is appropriate, and CBS' motion should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Ellen Klutch , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 23rd day of April , 1980, I served a copy of the annexed paper upon

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by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Ellen Klutch

Sworn to before me this
23rd day of April , 1980.

Lucille M. Browne

LUCILLE M. BROWNE
Notary Public, State of New York
No. 31-4526828
Qualified in New York County
Commission Expires March 30, 1982